IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 26TH JUNE 2007 / 5TH ASHADHA 1929

FAO.No. 166 of 2003()

AS.189/1996 of SUB COURT, TIRUR
OS.70/1995 of MUNI-MAGI.COURT,PONNANI
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APPELLANTS/APPELLANTS/DEFENDANTS:
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1. BALAKRISHNAN, S/O. APPUKUTTAN,
MODIRAVALAPPIL HOUSE, P.O. EDAPPAL,
MALAPPURAM DISTRICT.

2. UNNI, -DO- -DO-.

3. SANKARAN, S/O. SANKARAN, -DO-.

BY ADV. SRI.K.RAMACHANDRAN
SRI.P.RAMACHANDRAN

RESPONDENTS: RESPONDENTS/PLAINTIFFS:
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1. NARAYANAN, S/O. KARUPPAN,
MODIRAVALPPIL HOUSE, P.O. EDAPPAL,
MALAPPURAM DISTRICT.

2. MADHAVAN, S/O. KARUPPAN, -DO-.

3. MALU, W/O. AYINIYIL KUMARAN, -DO-.

4. DEVAKI, W/O. KAKKAKOTTIL ACHUTHAN,
-DO-.

5. KAMALU, W/O. VIRUTHIPARAMBIL APPU, -DO-.

6. NARAYANI, W/O. PADICKAPARAMBIL BALAN,
-DO- -DO-.

BY ADV. SRI.T.KRISHNAN UNNI

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON26/06/2007 THE COURT ON 26/06/2007 PASSED THE FOLLOWING:

K.PADMANABHAN NAIR . J.

F.A.O No. 166 of 2003

Dated this the 26th day of June 2007

JUDGMENT

The defendants in O.S. 70/1995 on the file of the Munsiff-Magistrate Court Ponnani are the appellants. This appeal is filed challenging a judgment passed by the Sub- Court Tirur in A.S. No. 189 of 1996 by which it had set aside a judgment and decree passed by the trial court and remanded the suit for fresh disposal.

2. Plaintiffs filed a suit for fixation of boundary and also for a decree of mandatory as well as prohibitory injunction. Plaintiffs wanted to restrain the defendants from trespassing into their property. A commission was deputed . The Commissioner filed Exts C1 report and C2 plan. The trial court accepted the report and plan. It was found that the prayer for mandatory injunction was to remove a ridge which was already removed. and hence there was no need for the mandatory injunction The trial court fixed the EF line in Ext.C2 plan as the boundary line separating the properties of the plaintiffs from that of the defendants. . The trial court also passed a decree of permanent prohibitory injunction.

3. Challenging the decree passed by the trial court the defendants

filed A.S. 189/1996 before the Sub-court Tirur. The learned Sub-judge held that the suit for fixation of boundaries is maintainable. But analysing the evidence, the lower appellate court held that fixing EF line shown in Ext.C2 plan as the boundary dividing the plaintiffs' property from that of the defendants' property was not correct. It was further held that after identifying A & B schedule properties alone the boundaries can be fixed. So the lower appellate court given an opportunity to the plaintiffs to take steps to remit Exts. C1 report & C2 plan for the purpose of identifying the plaint A & B schedule properties and for fresh disposal. Challenging that order of remand this F.A.O. is filed.

4. The substantial question of law arising for consideration in this F.A.O., is (i) whether the lower appellate court can set aside the decree and judgment of the trial court and remand the case to give an opportunity to the plaintiffs to fill up the lacuna in evidence.

5. The learned counsel appearing for the appellants has strenuously argued before me that after finding that the plaintiffs' failed to get the properties identified the lower appellate court should not have remanded the matter so as to enable the plaintiff s to fill up a lacuna in evidence. It is argued that being a suit for fixation of boundary it was the duty of the plaintiffs to get the suit properties identified. It is argued that there was absolutely no material available before the trial court for fixing

the boundary. It is also argued that the trial court fixed an imaginary line which is shown as EF line in Ext.C2 plan. It is further argued that the lower appellate court without proper appreciation of evidence held that the plaintiffs failed to get the suit properties identified. According to the appellants the lower appellate court ought to have dismissed the appeal.

6. The main reliefs sought for in the plaint was for the fixation of boundary. There was dispute between the parties regarding the identification of the properties. The plaintiffs filed an application to depute a Commissioner to identify the suit property. The Commissioner identified the suit properties and filed the report. The appellants filed an objection. But the commissioner was not examined. In fact the appellants did not substantiate their contention. So the trial court accepted the Commissioner's report and decreed the suit. The lower appellate court on a re- appreciation of the evidence found that the first thing to do was to identify the properties and then fix the boundary .For that purpose the suit was remanded with a direction to remit Exts C1 & C2 with the commissioner. I do not find any illegality or impropriety in that order. The lower appellate court has not given an opportunity to the plaintiffs to fill up a lacuna. The plaintiff sought the assistance of the court for fixation of the boundary The dividing line was located by a Commissioner

appointed through the court. If that line was not correct the only course open to the trial court was either to remit the report and plan or appoint another Commissioner. So the order remanding the case is correct .

7. The counsel for the appellants has argued that in an appeal filed by the defendants while remanding the case the plaintiffs alone were given an opportunity to adduce evidence. Since an opportunity is given to the plaintiffs to adduce evidence, it is just and proper that the appellants also be given a chance to produce materials before the commissioner If the appellants want the commissioner to note any matter other than those matters which the trial court had already directed him to note they can file a work memo before the trial court and request the trial court to issue necessary direction to note that matter also. If such a request is made the trial court shall consider their request and pass appropriate orders. It is open to the trial court to direct the defendants to pay additional bata or remuneration to the Commissioner.

With the above said observations this F.A.O is dismissed.

K.PADMANABHAN NAIR,JUDGE

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